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**Issue Date: 08 June 2005**

Case No.: 2004-LHC-1816

OWCP No.: 6-185718

In the Matter of

DANIE L. TAYLOR,  
Claimant,

v.

GEORGIA PACIFIC CORPORATION,  
Employer.

**DECISION AND ORDER**

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act (hereinafter the Act), 33 U.S.C. § 901 et. seq. brought by Danie L. Taylor (Claimant) against Georgia Pacific Corporation (Employer).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in Savannah, Georgia on February 3, 2005. All Parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1. Joint Exhibit (JX) 1
2. Claimant's Exhibits (CX): 1 – 22
3. Employer's Exhibits (EX): 1 – 15.

Based on the following stipulations of the Parties at the hearing, the evidence introduced and the arguments presented, I find as follows:

I. Stipulations

1. The Act applies to this claim.
2. Claimant and Employer were in an employer-employee relationship at the time of the injury.

3. The injury arose out of and in the scope of employment.
4. The date of the injury was November 11, 1999.
5. The date when Employer was advised or learned of the injury was November 11, 1999.
6. It is agreed that timely notice of the injury was given to Employer.
7. Employer filed a first report of accident on September 26, 2001.
8. It is agreed that Claimant filed a timely notice of claim.
9. Claimant has been paid temporary partial disability since June 30, 2000 to the present and continuing.
10. Claimant's average weekly wage was \$1045.56.
11. The date of maximum medical improvement (MMI) was October 28, 2002.
12. Claimant has not returned to his regular employment with Employer since the date of injury.

## II. Issues<sup>1</sup>

What is the extent of Claimant's disability as of October 28, 2002?

What is Claimant's wage-earning capacity since October 28, 2002?

## III. Findings of Fact

### *Claimant's Testimony*

Claimant is forty-nine years old and has been employed with Employer for twenty-eight years. (Tr. 9-10). Claimant worked as a utility limestone dock operator at the time of his injury. (Tr. 10). In this capacity Claimant did preventative maintenance on the dock conveyor belts and unloaded limestone and gypsum material from ships. His duties included operating the conveyor belt system that would unload ships and cleaning up limestone and gypsum that would fall off the belt. (Tr. 12-13). The physical

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<sup>1</sup> Since the completion of this hearing, the District Director has informed this Court that he does not oppose Section 8(f) relief. Claimant does not contest this matter as well. Consequently, the question of whether Special Fund relief is appropriate if benefits are granted is not before this Court.

requirements of this position included bending, twisting, climbing, lifting at least fifty pounds, pushing one hundred pounds and pulling seventy-five pounds. (CX 4 at 1-2).

On November 11, 1999, Claimant was hurt while conducting preventive maintenance on the conveyor belt systems that run from the ship to the stockpile area. Specifically, Claimant injured his right shoulder while repairing a Trommel machine. (Tr. 13). This was not Claimant's first injury to his right shoulder. Claimant affirmed that he injured his right shoulder in 1997 in an off the job accident and had to miss three months of work. As a result of the 1997 injury, Claimant underwent surgery and therapy. After injuring his shoulder again in 1999, Claimant underwent two surgeries. Claimant also affirmed that in the early 1990's Claimant injured his back and left leg, which never completely healed and has continued to give him problems. (Tr. 15-16). Despite these problems, Claimant asserts Employer did not make any accommodations for his physical limitations. (Tr. 16). However, Claimant did continue to work.

Since injuring his shoulder in 1999, Claimant has continued to have problems. For instance, Claimant continues to have numbness, problems gripping, pain and stiffness. (Tr. 17). Claimant continues to take prescription medication. After injuring his shoulder, Claimant continued to work until June 30, 2000. On this date, Claimant's treating physician, Dr. Wheeler, took Claimant out of work in order to have surgery. After surgery, Employer only offered Claimant a couple temporary positions within his restrictions. Claimant is unable to return to his job as a utility limestone dock operator because the position requires climbing, pulling and using a six pound jack hammer. (Tr. 25).

Claimant also took a part-time seasonal job in early 2000 as an umpire. (Tr. 20-21). Claimant submitted the pay information from this position for 2000 through 2004. He is only able to umpire sports where there is minimal running and bending over. He is also only able to work a couple times a week because he needs a day to recover. (Tr. 24).

Claimant has continued to look for employment since 2001. (CX 15). He has kept a job-search log since 2001 of all the jobs he has sought. (Tr. 25; CX 15). However, other than umpiring, Claimant has not been offered a job. He has also taken classroom training with Employer in order to apply for other positions with the company. Claimant also contacted the potential employers listed in Corvel's reports of January 7, 2005 and February 1, 2005. These employers either did not offer him a position, the position was closed, the position was out of state or the position was outside his physical limitations of no standing, no overhead work, no climbing and not lifting anything over thirty pounds. (Tr. 30).

The survey identified a job as a Processor. Claimant testified he contacted the agency Manpower, which was taking the applications. (Tr. 29). Claimant has not received a reply from Manpower. (Tr. 29). He also did not receive a reply regarding his application for a position as a Director of Human Resources at Atlantic Wood Industries. (Tr. 33). He sent his resume to the employer twice, but had not received a response either time.

A “supervisor of janitorial services” position was also listed and Claimant contacted Jada Flowers at the Department of Labor, regarding his eligibility. (Tr. 29). Claimant was instructed that he was not qualified because he did not have the necessary years of experience. Ms. Flowers also informed Claimant that he was not qualified for a courier position listed in the survey because of physical requirements outside of his restrictions. (Tr. 30). Claimant was also found unqualified to be a material handling supervisor after sending in an application and being interviewed. (Tr. 32).

Furthermore, an appointment clerk position was listed in the Corvel survey; however Claimant testified he did not apply for this job. According to his testimony, he was required to apply for the position through the South Carolina Employment Security Commission and he did not wish to work outside the state of Georgia. (Tr. 31). Claimant also did not apply for the recreation facility attendant job because it was in South Carolina. (Tr. 33).

The updated survey completed on February 1, 2005 listed a position as a shipping coordinator. According to Ms. Flowers, this position was with Employer, but at a different facility. (Tr. 35). Claimant has not been offered this position by Employer. The survey also listed three warehouse supervisor positions. Claimant testified that he contacted Kelly Services to inquire about their availability and he spoke with Ms. Barbara Dietrick. (Tr. 35-36). According to Ms. Dietrick this is actually one position. Claimant has submitted an application, but has not been offered the job. (Tr. 36).

Employer has not offered him any positions since Dr. Wheeler restricted Claimant to permanent light duty. According to a letter from Employer dated January 16, 2001, Employer does not have light duty positions. (CX 5). Furthermore, Employer stated Claimant is not permitted to return to work until he has a “full return to work” release from his physician with no restrictions. (CX 5).

On cross-examination, Claimant affirmed that he would be willing to drive up to twenty-five miles to work; however, he was generally opposed to working outside the state of Georgia. (Tr. 40). Claimant also affirmed that he volunteers as a team manager on his mother’s softball team. (Tr. 57). This job includes some traveling out of state.

#### *Deposition and Medical Records of Dr. Spencer M. Wheeler*

Dr. Wheeler, an orthopedic surgeon (CX 19), first examined Claimant on October 1, 1997. (EX 13 at 6). Based on this examination, Dr. Wheeler diagnosed Claimant with a rotator cuff tear in his right shoulder and gave him an injection in that shoulder. Dr. Wheeler also advised Claimant about surgical intervention. An arthrogram was done on Claimant’s shoulder on October 2, 1997, the results of which showed a complete tear. (EX 13 at 7; EX 2 at 6).

Dr. Wheeler also performed open rotator cuff repair surgery on Claimant's shoulder in 1997. (EX 13 at 7). Dr. Wheeler confirmed that he believes Claimant had a permanent partial disability in his right shoulder after the surgery. Due to the nature of the tissue in the rotator cuff, a patient has an increased risk of re-injuring his shoulder once it has been injured. (EX 13 at 8-9). According to Dr. Wheeler's records of April 6, 1998, Claimant had restricted motion at extremes and some discomfort. (EX 13 at 10; CX 8 at 4). On cross-examination, Dr. Wheeler affirmed that he did release Claimant to regular duty on January 5, 1998. (EX 13 at 20; CX 8 at 5).

Claimant injured his right shoulder again in 1999 and Dr. Wheeler started treating him on February 28, 2000. Dr. Wheeler did not find any weakness in the shoulder, but Claimant was experiencing pain and discomfort. Based on his examination, Dr. Wheeler concluded Claimant had aggravated the rotator cuff, but did not find any tears. (EX 13 at 10-11; CX 9 at 4). Claimant returned on March 22, 2000 after an MRI showed a small complete defect. Dr. Wheeler gave Claimant another injection and sent him to therapy. (EX 13 at 11; CX 9 at 4).

On April 6, 2000 Claimant returned still complaining of pain, but experiencing overall improvement. (EX 13 at 11; CX 9 at 5). On June 12, 2000, Claimant returned to Dr. Wheeler complaining of weakness and a worsening of pain. (EX 13 at 11; CX 9 at 5). Dr. Wheeler decided to conduct an arthroscopy of Claimant's right shoulder on June 30, 2000. This operation showed a significant cuff tear and Dr. Wheeler repaired the tear. (EX 13 at 12). Dr. Wheeler's records indicate that Claimant's shoulder slowly improved; however, Dr. Wheeler found that Claimant's restrictions would never allow him to return to full, unlimited duties. (CX 9 at 7). Consequently, Dr. Wheeler placed Claimant on permanent restrictions of no overhead lifting, no overhead use of his arm, and no lifting greater than thirty pounds. (CX 9 at 7). On March 28, 2002, Dr. Wheeler noted Claimant had reached MMI and on October 28, 2002, he noted Claimant as having a twenty-eight percent permanent partial impairment to his upper extremity. (CX 9 at 13, 16).

Dr. Wheeler described the 2000 procedure as similar to the 1997 procedure. Dr. Wheeler also testified that he believes if Claimant had only had the 2000 procedure, and not the 1997 procedure, he would have been able to return to work. (EX 13 at 14). Furthermore, according to Dr. Wheeler, Claimant's disability after the 1999 injury and 2000 procedure is greater because of the 1997 injury and procedure. (EX 13 at 15).

Claimant had a subsequent procedure in 2001 after his rotator cuff pulled off completely and Dr. Wheeler performed a graft. (EX 13 at 15-16). Dr. Wheeler testified that this procedure was required sooner than usual because of the 1997 original injury to Claimant's shoulder. (EX 13 at 16-17).

Dr. Wheeler also treated Claimant for back problems. Claimant was experiencing persistent pain in the lower back and leg with uncomfortable feelings in the lower extremities. First, Dr. Wheeler ordered an MRI, which showed no disk protrusions or disk herniations. (EX 13 at 19). Dr. Wheeler then sent Claimant to therapy, which

was not successful. The medical records for the therapist indicate Claimant was unable to perform adequate hip flexion on the left hip. (CX 12). On April 13, 2003 the physical therapist noted Claimant was unable to lift his left hip. (CX 13). Consequently, Dr. Wheeler sent Claimant to Dr. Kirby in June, 2003 and recommended an epidural. On cross-examination, Dr. Wheeler affirmed that he does not have an opinion on whether his back was limiting Claimant's ability to work. (EX 13 at 22).

#### *Medical Records from Industrial Health Care Services, Inc.*

Claimant was first treated by the physicians at Industrial Health Care Services, Inc., on January 14, 1992. He met with Dr. McGinnis who noted Claimant was complaining of low back pain, pain in his left leg and weakness. (CX 6 at 1). Claimant again sought treatment for a "frozen shoulder." (CX 6 at 2). He was released on January 18, 2000 to modified work with limited use of his right arm. However, on February 14, 2000, another doctor issued a report stating Claimant was unable to return to work due to the limited use of his right arm as a result of his injury of November, 1999. (CX 6 at 8).

#### *Corvel Labor Market Survey*

A labor market survey was conducted by Mr. Rusty Peavy, a vocational case manager. (EX 12). The survey was complied on January 6 and 7, 2005. The survey found ten jobs, which in the opinion of Mr. Peavy were appropriate for Claimant considering his physical restrictions, employment history and educational background.

The first position listed was a processor. (EX 12 at 1). The job requires the employee to verify quantity and quality information of products and items of merchandise that are ready for shipment at manufacturing or commercial establishments. The position also requires some recordkeeping and supervision of other employees. This entry level position's wage was listed as \$8.00 per hour.

The next job listed was a supervisor for janitorial services. (EX 12 at 2). This job requires the employee to supervise and coordinate activities of workers engaged in cleaning and maintaining premises of commercial, industrial, or other establishments. Specific duties include training workers, hiring employees and resolving worker disputes. There was no salary range provided.

The survey also listed a position as a courier. (EX 12 at 3). The duties of this job include delivering messages, telegrams, documents, packages to businesses and homes. This position also requires some recordkeeping. The wage was listed as \$12.59 per hour.

A customer service position was listed as an entry level job with potential for advancement. (EX 12 at 3). This job requires the employee to solicit orders for merchandise or services over the phone. The employee must call prospective customers, quote prices, record customer information and develop lists of prospects

from city and phone directories. A similar position as an appointment clerk was also in the survey. (EX 12 at 3). Specifically, this position requires the employee to schedule appointments with the employer for clients. The pay for each of these positions was listed as \$5.15 and \$7.50 respectively.

The survey also identified a material-handling supervisor, which paid \$12.00 to \$14.00 per hour. (EX 12 at 4). The employee in this position must supervise and coordinate activities of workers engaged in lifting, transporting, storing and loading materials and products. The position also requires the employee to train new workers. Another supervisor position was titled yard supervisor. (EX 12 at 4). This position supervises and coordinates activities of workers engaged in unloading, storing and distributing materials. The employee must also inspect incoming materials and verify invoices. The salary for this position was listed as \$29,000 to \$42,000 a year. A material-handling supervisor position was also listed in the survey. (EX 12 at 5). This position also supervises and coordinates activities of workers engaged in lifting, transporting, storing and loading materials and products. No wage was listed for the position.

Claimant was also found suitable for a position as a recreation-facility attendant. (EX 12 at 5). The responsibilities of this position include scheduling the use of recreation facilities such as golf courses, tennis courts and softball diamonds. The employee is also in charge of collecting fees and renting equipment. This position's wage was listed as \$5.15 an hour.

Lastly, the survey described a shipping clerk position as suitable for Claimant. (EX 12 at 6). The duties of this position include verifying quantity, quality, labeling and addressing of products and items of merchandise ready for shipment at manufacturing or commercial establishments. The employee is also responsible for some recordkeeping and supervision of employees. No wage was listed in the survey.

The survey was updated on February 1, 2005 and four additional jobs were found suitable for Claimant. First, a Shipping Coordinator position was described. (EX 12 at 8). This job requires the employee to supervise and coordinate activities of workers engaged in verifying and keeping records on incoming and outgoing shipments and preparing items for shipment. The position also oversees the incoming and outgoing shipments to ensure accuracy, completeness and condition of shipments. The position was listed as paying a wage of \$11.99 per hour. Lastly, the updated survey listed three warehouse supervisor positions. (EX 12 at 8-9). These positions require the employee to supervise and coordinate activities of workers engaged in receiving, transporting, stacking, order filing, shipping and maintaining stock records in warehouse. The employee must also be able to train new workers. The pay ranged from \$12.00 per hour to \$14.00 per hour.

### *Greater Savannah Area Umpires Association Records*

Claimant has umpired during each softball season since spring of 2000 and he continues to umpire. (Tr. 55). His first pay check was dated May 21, 2000. (EX 7). Claimant received \$682.50, \$2,279.07, \$701.35, \$1,515.40 and \$1,653.00 during the 2000, 2001, 2002, 2003 and 2004 seasons respectively.

### *Vocational Rehabilitation Records of Steven A. Yuhas*

Mr. Yuhas was appointed to provide vocational rehabilitation to Claimant in September, 2002. Based on Claimant's medical history, employment history and daily activity, Mr. Yuhas found Claimant to be an excellent candidate for positions such as shipping supervisor. (EX 5 at 10).

Mr. Yuhas' work with Claimant was interrupted in November, 2002 after Claimant underwent corrective surgical repair on his left shoulder. (EX 5 at 9). In March, 2003, Mr. Yuhas received the physician's restrictions regarding Claimant's left shoulder. (EX 5 at 15). However, Claimant's status remained interrupted due to back problems and difficulties with his left leg. (EX 5 at 16). In August, 2004, Mr. Yuhas closed Claimant's file and suggested he contact Deborah Murphy, a rehabilitation specialist with OWCP at the US Department of Labor, when he is able to participate in a plan of vocational services. (EX 5 at 27).

## IV. Discussion

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence and draw his own inferences from it and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chicago Grain Trimmers Ass'n, Inc., 390 U.S. 459, 467 reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994) aff'g 990 F.2d 730 (3d Cir. 1993).

### *Nature and Extent*

The Parties have established that Claimant was injured at work on November 11, 1999. (JX 1). Having established work-related injuries, the burden rests with Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A claimant's

disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274 (1989). Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Ltd., 14 BRBS 395 (1981).

The Parties stipulated and I find that Claimant reached MMI on October 28, 2002. (JX 1). Claimant has been paid temporary partial disability since June 30, 2000 to the present and continuing. (JX 1). Employer does not dispute that Claimant's condition is permanent. However, Employer does contest the degree of Claimant's disability.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the Act means an incapacity, as a result of an injury, to earn wages, which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. § 902(10). In order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 521 U.S. 121 (1997). A claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (*de minimis*), a total loss, or a partial loss.

A claimant who is unable to return to his former employment due to his work-related injury establishes a *prima facie* case of total disability. Elliot v. C & P Tel. Co., 16 BRBS 89, 92 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339, 342-43 (1988). The burden then shifts to the employer to show the existence of suitable alternative employment. Trans-State Dredging v. Benefits Review Bd., 731 F.2d 199, 200 (4th Cir. 1984); Rinaldi v. General Dynamics Corp., 25 BRBS 128, 131 (1991). A claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. Rinaldi, 25 BRBS 128. If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. Southern v. Farmer's Export Co., 17 BRBS 24 (1985).

#### *Claimant's Prima Facie Case*

The Parties have stipulated that Claimant has not returned to his regular employment with Employer since he was injured. (JX 1). Claimant testified that he is

unable to return to his job as a utility limestone dock operator because the position requires climbing, pulling and using a six pound jack hammer. (Tr. 25). Claimant's testimony is supported by additional evidence in the record. Dr. Wheeler concluded Claimant had a twenty-eight percent permanent partial impairment to his upper extremity. (CX 9 at 13, 16). Dr. Wheeler also placed Claimant on permanent restrictions of no overhead lifting, no overhead use of his arm and no lifting greater than thirty pounds. (CX 9 at 7). Employer, however, has notified Claimant that he is not permitted to return to work until he has a "full return to work" release from his physician with no restrictions. (CX 5). Based on this evidence, I find that Claimant has established a prima facie case of total disability.

### *Suitable Alternative Employment*

Once a claimant makes a prima facie case of total disability, the burden of production shifts to the employer to establish the existence of suitable alternative employment for which the claimant could realistically compete if he diligently tried. Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 54 (4th Cir. 1988) (citing Trans-State Dredging v. BRB, 731 F.2d 199, 200 (4th Cir. 1984)). An employer can establish suitable alternative employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and the claimant is capable of performing such work. Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171 (1986); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). In the alternative, employer can meet this burden by showing the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in his geographic area. Royce v. Erich Cosntr. Co., 17 BRBS 157 (1985); see also Williams v. Halter Marine Serv., 19 BRBS 248 (1987). For job opportunities to be realistic, the employer must establish the precise nature and terms of each job and pay for the alternative jobs. Moore v. Newport News Shipbuilding & Dry Dock Co., 7 BRBS 1024 (1978). The employer must produce evidence of realistically available job opportunities within the claimant's local community which he is capable of performing considering his age, education, work experience and physical restrictions. Trans-State Dredging v. BRBS, 731 F.2d 199 (4th Cir. 1984).

Employer has not offered Claimant any positions in its facility since Dr. Wheeler restricted Claimant to permanent light duty. However, Employer has offered vocational evidence to meet its burden. Employer relies on Corvel's labor market survey conducted on January 6 and 7, 2005 to show suitable alternative employment. The survey listed ten jobs, which Employer found appropriate for Claimant considering his physical restrictions, employment history and educational background.

The first position listed was titled "processor." (EX 12 at 1). The duties of this position require the employee to verify quantity and quality information of products and items of merchandise that are ready for shipment at manufacturing or commercial establishments. The position also includes some recordkeeping and supervision of

other employees. There were no physical requirements and the position pays \$8.00 per hour.

The survey listed various supervisory positions as suitable for Claimant. First a position listed in the survey was a supervisor of janitorial services. (EX 12 at 2). This job requires the employee to supervise and coordinate activities of workers engaged in cleaning and maintaining premises of commercial, industrial or other establishments. As a supervisor, the employee must train workers, hire employees and resolve worker disputes. There were also no physical requirements and no salary was listed. Claimant has the appropriate experience for this position and I find it to be suitable alternative employment.

A third position listed as suitable for Claimant was identified as a material-handling supervisor. (EX 12 at 4). The employee in this position must supervise and coordinate activities of workers engaged in lifting, transporting, storing and loading materials and products. There were no physical requirements and the position paid \$12.00 to \$14.00 per hour. Another supervisor position was titled yard supervisor. (EX 12 at 4). This position supervises and coordinates activities of workers engaged in unloading, storing and distributing materials. The salary for this position was listed as \$42,000 a year. Lastly, a material-handling supervisor position was listed. (EX 12 at 5). This position also requires the employee to supervise and coordinate the activities of workers engaged in storing and loading materials and products. No wage was listed for this position. Given Claimant's experience and the minimal physical demands, I find each of these positions to be suitable alternative employment.

Furthermore, the survey listed a position as a courier. (EX 12 at 3). The duties of his job mainly include delivering messages, telegrams, documents and packages to business and homes. There were no physical requirements listed and the pay was \$12.59 per hour. A similar position as a shipping clerk was also found suitable for Claimant. (EX 12 at 6). The duties of this position include verifying quantity, quality, labeling and addressing of products and items of merchandise ready for shipment at manufacturing or commercial establishments. There was no wage listed for this position. Claimant has the necessary experience to be suitable for each of these jobs.

The survey also listed a customer service position where the employee was required to solicit orders for merchandise or services over the phone. (EX 12 at 3). The employee must call prospective customers, quote prices, record customer information and develop lists of prospects from city and phone directories. A similar position as an appointment clerk was also in the survey. (EX 12 at 3). This job mainly requires the employee to schedule appointments. The pay for these positions was listed as \$5.15 and \$7.50 respectively. I find each of these positions to be suitable alternative employment.

Lastly, the original survey listed a position as a recreation-facility attendant. (EX 12 at 5). The responsibilities for this position include scheduling the use of recreation facilities such as golf courses, tennis courts and softball diamonds. The employee is

also in charge of collecting fees and renting equipment. The pay for this position was listed as \$5.15 an hour and I find it suitable for Claimant.

The survey was updated on February 1, 2005 and four additional jobs were found suitable for Claimant. A Shipping Coordinator position was identified, which requires the employee to supervise and coordinate activities of workers engaged in verifying and keeping records of shipments. (EX 12 at 8). The employer listed the wage as \$11.99 for this position. Lastly, the updated survey listed three warehouse positions, which had a pay range from \$12.00 per hour to \$14.00 per hour. The duties of this position include supervising and coordinating activities related to receiving and transporting merchandise, as well as, maintaining records of these transactions. I find each of these positions to be within Claimant's physical restrictions and to be suitable alternative employment.

Therefore, I agree with the survey's conclusions that there are positions within Claimant's restrictions and appropriate given his past work experiences. The survey demonstrates that a range of jobs existed in the Savannah, Georgia area, which were reasonably available, and which Claimant could have realistically secured and performed. See Lentz v Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn in the survey are creditable, as it has demonstrated an awareness of Claimant's age, education, work experience and physical limitations when the local opportunities were explored. See Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Employer has demonstrated that the suitable alternative employment existed as of January 7, 2005. The compensation rates for these positions ranged from \$5.15 an hour to \$14.00 an hour. There were also positions that identified the pay in terms of annual salary and this range was from \$29,000 to \$42,000 a year.

Employer also argues that Claimant's current position as a softball umpire is suitable alternative employment. Since 2000 Claimant has had a part-time seasonal position as a softball umpire. This job is within Claimant's physical restrictions; however, he is only able to work a couple times a week because he needs a day to recover after a day working. (Tr. 24). Claimant received \$684.50, \$2,279.07, \$701.35, \$1,515.40 and \$1,653.00 during the 2001, 2002, 2003 and 2004 seasons respectively. I find that this position is also suitable alternative employment and has existed since May, 2000. (EX 7).

#### *Diligent Job Search*

Claimant may nevertheless prevail in his quest to establish total disability if he demonstrates that he tried diligently and was unable to secure employment. Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). The claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available and must establish a willingness to work. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1043 (5th Cir. 1981).

Claimant testified that he has continued to look for employment since 2001. (Tr. 25). He has kept a job-search log since then, which lists all the jobs he has sought. (CX 15). Furthermore, he has taken classroom training with Employer in order to apply for additional jobs within the company. He has also testified that he contacted the potential employers listed in Corvel's labor market survey of January 7, 2005, as well as the updated version of February 1, 2005. According to Claimant, these employers either did not offer him a position, the position was closed, the position was out of state or the position was outside his physical limitations of no standing, no overhead work, no climbing and not lifting anything over thirty pounds. (Tr. 30).

Claimant testified and his job-search log indicates that many employers did not respond to Claimant's application. (CX 15). Specifically, he sent his resume to Manpower regarding a position as a processor and he sent an application for a position as a Director of Human Resources at Atlantic Wood Industries. However, he did not hear a response regarding either. (Tr. 33).

Claimant also testified that he was found unqualified for certain positions. For instance, he did not have the necessary years of experience for the position of supervisor of janitorial services. (Tr. 29). Also, the physical requirements of the courier position were outside of his restrictions. (Tr. 30). Lastly, he was found unqualified to be a material handling supervisor after sending in an application and being interviewed. (Tr. 32).

Claimant also inquired about the positions added to the updated portion of the survey. Ms. Jada Flowers at the Department of Labor instructed Claimant that the position as a shipping coordinator was with Employer. (Tr. 35). Employer, however, has not offered Claimant this job. Furthermore, while the updated survey identifies three warehouse supervisor positions, Ms. Barbara Dietrick at Kelly Services told Claimant this was inaccurate. There was actually only one warehouse position open. Claimant submitted his application, but has not yet been offered a job. (Tr. 36).

Employer contends that the records of Mr. Steven Yuhas indicate that Claimant has not conducted a diligent job search. According to Mr. Yuhas' records, he was never able to assist Claimant in finding a job because of Claimant's surgery to his left shoulder and later problems with his left knee. (EX 5 at 9, 15). Consequently, Mr. Yuhas closed Claimant's file in August, 2004. Employer argues that Claimant's inability to work with Mr. Yuhas indicates that Claimant was unable to engage in a job search. I disagree. Claimant's testimony and his job-search log indicate Claimant was willing and in fact did search for employment. Not only did Claimant apply for the majority of positions listed in the labor market survey conducted for Employer, but his job-search log indicates an extensive search conducted on his own initiative. (CX 15). I find that Claimant has diligently tried but was unable to secure employment other than as a softball umpire.

Claimant has a part-time seasonal job as a softball umpire. (Tr. 20-21). He has umpired since spring of 2000. (Tr. 55; EX 7). Claimant is only able to umpire a couple days a week because his physical condition requires that he take a day off to recover

after a day working. (Tr. 24). This position is also not for a full year, as the softball season begins in April and ends in November. While Claimant did diligently try and was unsuccessful in obtaining other employment, including searching the suitable alternative employment identified by Employer, his position as an umpire demonstrates that Claimant is not totally disabled. Therefore, Claimant's disability became permanent and partial as of October 28, 2002.

### *Wage-Earning Capacity*

The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of the injury in the same or other employment. 33 U.S.C. § 902(10). Thus, any compensation for Claimant's permanent partial disability will be based on any adverse effect such a disability has on his ability to earn an income. For permanent partial disability, Section 8(c) sets out a schedule of compensation for numerous specific physical impairments or losses. However, Claimant's injury is not one of the scheduled injuries. Instead, compensation for his permanent partial disability is determined by Section 8(c)(21). Section 8(c)(21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee at the time of the injury and the employee's wage-earning capacity thereafter in the same or another employment.

The Parties stipulated that Claimant's average weekly wage at the time of his injury on November 11, 1999 was \$1045.56. (JX 1). Next, the Parties have agreed that the issue specifically concerns Claimant's wage-earning capacity since October, 2002. (Tr. 6). Since that date, Claimant earnings are solely from umpiring softball. The most accurate indication of his wage-earning capacity is his earnings from the 2004 softball season, which was a total of \$1653.00, giving him a weekly wage of \$31.79. Employer contends that only relying on Claimant's umpiring wages does not accurately reflect his wage-earning capacity. Specifically, Employer argues that if Claimant can find employment from April to November as an umpire, he should be able to obtain similar work for the remaining months of the year. However, Claimant has diligently sought additional work, but no employer has offered him a position. (CX 15). Furthermore, Claimant testified that he is only able to umpire sports, such as softball, where there is minimal running and bending over. (Tr. 24).

I find Claimant's post-injury weekly wage-earning capacity, since October 29, 2002, is \$31.79. The post-injury earning capacity is less than his pre-injury average weekly wage of \$1045.46. Consequently, under Section 8(c)(21) of the Act, Claimant is entitled to two-thirds of the difference between his pre-injury average weekly wage of \$1045.46 and his post-injury wage earning capacity of \$31.79.

### **ORDER**

1. Claimant was paid compensation at the appropriate rate prior to October 29, 2002.

2. Employer shall pay permanent partial disability benefits commencing on October 29, 2002, based on an average weekly wage of \$1045.46 and a wage-earning capacity of \$31.79 in accordance with Section 8(c)(21) of the Act.
3. Employer is entitled to Special Fund relief under Section 8(f) of the Act upon the expiration of 104 weeks from October 29, 2002.
4. Employer shall receive a credit for benefits and wages paid.
5. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at the rate provided by 28 U.S.C. § 1961.
6. Within thirty days of receipt of this Order, counsel for Claimant should submit a fully-documented fee application, a copy of which shall be sent to opposing counsel, who shall have twenty days to respond.
7. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

A

LARRY W. PRICE  
Administrative Law Judge

LWP/TEH  
Newport News, VA